

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of D.B.)	
And)	
Merrillville Community Schools,)	Article 7 Hearing No. 1228.01
Northwest Indiana Special Education)	
Cooperative)	
)	
Appeal from a Decision by)	
Jerry L. Colglazier, Esq.,)	
Independent Hearing Officer)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the parent or parents of the student. It should also be noted that Merrillville Community Schools and Northwest Indiana Special Education Cooperative will be referred to collectively as the “School.”

On June 1, 2001, Student filed a request for a due process hearing with the Indiana Department of Education (see 511 IAC 7-30-3). In addition to the request for a due process hearing, by letters dated May 16, and June 5, 2001, to the Indiana Department of Education, Division of Special Education (DSE), Student filed a Complaint alleging violations of Article 7 provisions for a Free Appropriate Public Education (see 511 IAC 7-30-2). An Independent Hearing Officer (IHO) was appointed on June 1, 2001. The Complaint Investigation Request was received by the DSE on May 21, 2001, was referred to the IHO, and was incorporated into the Due Process Hearing and Decision.

A Prehearing conference was held on June 18, 2001, with a Prehearing Order entered on June 22, 2001. After the Prehearing Conference several Status Conferences were held. The parties defined the issues for determination as follows:

1. Whether the educational evaluation of the Student by the Local Education Agency (LEA) was appropriate and in compliance with 511 IAC 7-25-3 and 511 IAC 7-25-4?
2. Whether the Student is eligible for special education and related services and accommodations?
3. Whether the School was required to conduct a functional behavioral assessment and behavioral intervention plan procedures pursuant to 511 IAC 7-29-5 prior to suspension and expulsion as a result of the 1-24-01 incident?
4. Whether the School was required to conduct a manifestation determination pursuant to 511 IAC 7-29-6 prior to suspension and expulsion procedures resulting from the 1-24-01 incident?
5. Whether the School violated:
 - A. 511 IAC 7-29-8 protections for children not yet eligible for special education and related services;
 - B. 511 IAC 7-29-1, Suspension;
 - C. 511 IAC 7-29-2, Expulsion;
 - D. 511 IAC 7-29-8 with regard to the allegation that School failed to afford the protections of Article 7 to a student the school is deemed to have knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred, specifically the protections of:
 - (1) 511 IAC 7-29-1(d) with regard to the allegation that School suspended a student with a disability from the student's current placement for more than ten (10) consecutive days.
 - (2) 511 IAC 7-29(1)(f) with regard to the allegation that School failed to provide services to a student with a disability that has been suspended for more than ten (10) cumulative instructional days in the same school year;
 - (3) 511 IAC 7-29-2(b) with regard to the allegation that School

failed to follow appropriate change in placement procedures as described in 511 IAC 7-27-5, as well as 511 IAC 7-29-2 with regard to the allegation that School failed to provide services to a student with a disability who has been expelled from school?

The due process hearing was convened on September 11, 2001 and completed on September 13, 2001. Prior to the start of the evidentiary portion of the hearing, and at intervals during the hearing, exhibits were ruled upon, admitted into evidence, and were made a part of the record. Admitted exhibits were School's exhibits pages 1(a) through 330, and Student's exhibits pages 1 through 69. By mutual agreement of the parties and their respective counsel, the forty-five (45) day rule for hearing and decision was waived.

The Written Decision of the IHO

The IHO's written decision was issued on October 20, 2001. The following background information is reproduced verbatim from the IHO's written decision.

Student is 16 years of age with a date of birth of January 11, 1985. The Student first enrolled in the Merrillville Community School system in the fall of 1999 for the school year 1999-2000 as a freshman at Merrillville High School. Student was in the general education curriculum, academically failed his freshman year, and was re-enrolled as a freshman for the school year 2000-2001.

Student was suspended from Merrillville High School for discipline reasons on October 13, 2000, and recommended for expulsion. The suspension was lifted at the end of the first semester in January 2001, returning the Student to Merrillville High School on or about January 23, 2001. The first semester expulsion process was expunged from the Student's record by letter of the Superintendent on June 4, 2001.

Student was again suspended from Merrillville High School on January 24, 2001, for discipline reasons. Student was ultimately expelled from Merrillville High School [by the] Board of School Trustees on June 4, 2001, upholding the Superintendent's decision to expel the Student. The expulsion was modified to be in effect until the start of the 2001-2002 school year.

Student was involved in the Juvenile Justice System in Lake County rather than Merrillville High School from January 24, 2001, to the present. A Plea Agreement was entered into with the Juvenile Division of Lake Superior Court as a result of the incidents leading to the January 24, 2001, suspension from Merrillville High School. The Plea Agreement provided for a Class B Misdemeanor of Disorderly Conduct as follows: "on or about the 24th day of January, 2001, said child did recklessly, knowingly or intentionally engage in

fighting or tumultuous conduct, that is: loud, cursing, and defiant.” The Court scheduled a Court Ward Review Hearing for September 20, 2001. Pursuant to Order of Court on April 26, 2001, Student was placed in an Alternative Day Treatment Program (which includes academics) at the Indiana Boys School, Campagna Academy, Lake County, Indiana.

Student was involved in ten (10) discipline incidents from September 5, to October 13, 2000,... Student was involved in fourteen (14) discipline matters during his first freshman year from 11-18-99 to 3-20-00, which resulted in detentions, suspensions out, and Saturday school...There is no evidence of probative value that either the Parent or the School considered or treated the incidents ... as other than as discipline matters, and, as such, were not considered as IDEA or Article 7 related.

Parent submitted a written request for evaluation for possible emotional disorder on November 9, 2000, and signed Parent Permission for Special Education Evaluation on November 22, 2000... The Parent filed a request for a Complaint Investigation with the Indiana Department of Education, Division of Special Education on February 16, 2001. A Complaint Investigation Report for Complaint Number 1692.01 was issued March 22, 2001... The Report found that “On October 13, 2000, the student was suspended from school pending expulsion. Prior to the October 13 suspension, the parent had neither requested an educational evaluation nor expressed any concern in writing to certified personnel that the student was in need of special education and related services. No school personnel had expressed concern to the local director of special education regarding the student’s behavior or performance. School personnel characterized the student’s misbehavior as willful and attention seeking and did not believe the behavior demonstrated the need for special education and related services.” and; “The CCC reconvened on February 6, 2001 [sic, correct date March 6, 2001]. The student was determined not eligible for special education and related services.” The Report concluded that “the school was not deemed to have knowledge that the student was a student with a disability prior to the suspension and recommendation for expulsion.” The Report further concluded that “the CCC subsequently determined that the student was not eligible for special education and related services. Therefore, no violations of 511 IC [sic] 7-29-8, 511 IAC 7-29-1(d), 511 IAC 7-29-[1](f), 511 IAC 7-29-2(b), 511 IAC 7-29-5, and 511 IAC 7-29-6 are found... The Report did find the school failed to conduct an expedited evaluation and convene a CCC within twenty instructional days from the written request for an evaluation of a student subject to expulsion. The Complaint Investigation Report 1692.01 contains issues similar to issues in this Due Process Proceeding. As such, the Report Decision applies only to the suspension of October 13, 200[0], and does not address the suspension of January 24, 200[1].

The IHO determined thirty-four (34) Findings of Fact. Student’s evaluations include the following:

1. Tested by the LEA's School Psychologist and Educational Diagnostician on or about November 22, 2001.
2. A Psychology Evaluation was performed on the Student as a result of the referral and involvement of the Juvenile Justice System. The evaluation was performed by Warren Ugent, Psy.D., a Licensed Clinical Psychologist, and Nationally Certified School Psychologist. The battery of tests administered included intelligence, achievement tests, personality tests, and a behavior rating scale completed by the mother. The Psychological Evaluation was conducted February 5, 2001. Dr. Ugent testified that Student could meet three of the five elements of the criteria for Emotionally Handicap. The three conditions include (1) a general pervasive mood of unhappiness or depression, (2) an inability to build or maintain satisfactory interpersonal relations, (3) inappropriate behaviors or feelings under normal circumstances.
3. The LEA requested and conducted a Psychiatric Examination by Dr. Marvin Schwarz. The purpose of the examination was purportedly to rule out Bi-Polar Disorder which was referenced in Dr. Ugent's Report. The examination was conducted on August 27, 2001. The examination consisted of a 50 minute interview without any testing. Dr. Schwarz reported that there was no evidence of depression or bipolar disorder. The diagnosis was Opposition Defiant Disorder, DSM-IV TR 313.81, and no evidence of depression or Bi-Polar Disorder.

The IHO found that: Dr. Schwarz's primary diagnosis was equivalent to the primary diagnosis of Dr. Ugent, and of the School Psychologist; School did not provide any special education services to Student from the time of the initial suspension on October 13, 2000; School did not provide any academic services to Student from the time of the initial suspension on October 13, 2000, with the exception of academic services that were administered on January 24, 2001; School did not conduct a functional behavioral assessment or develop a behavioral intervention plan as a result of the January 24, 2001 incident which led to suspension and ultimate expulsion; School attributed the lack of success at school as a matter of choice and discipline decisions by Student; the record contained examples of alternatives, accommodations, and cooperative efforts available through the school system, the Court system, and the probation department to assist the parties in serving Student, and to assist Student in being a responsible decision maker.

The IHO concluded that: there is no evidence of probative value that Student has an absolute inability to control his disruptive behavior; the evaluation and determination of the LEA that Student is not eligible for special education and related services and accommodations is

appropriate; the LEA had conducted an evaluation and determined that Student was not a student with a disability under Article 7 at the time of the disciplinary action resulting in suspension on January 24, 2001; it is conclusive that the evaluation was complete, and presented to the parent on January 9, 2001; as the LEA had determined prior to January 24, 2001, that Student was not a student with a disability, Student was not entitled to the protections of 511 IAC 7-29-5 or 511 IAC 7-29-6, and the LEA did not violate 511 IAC 7-29-8, 511 IAC 7-29-1, and 511 IAC 7-29-2.

The IHO found that: the educational evaluation of Student by the LEA was appropriate and in compliance with IDEA and Article 7, with the exception that the LEA did not implement a general education intervention plan according to 511 IAC 7-25-3(b), which was successful; Student is not eligible for Special Education and related services and accommodations; and the LEA did not violate Article 7 provisions of 511 IAC 7-29-5, 511 IAC 7-29-6, 511 IAC 7-29-1, 511 IAC 7-29-2, or 511 IAC 7-29-8.

Appeal To The Board Of Special Education Appeals

Petition for Review

Student filed on November 30, 2001, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review includes the following information reproduced verbatim.

. . .The reason for my appeal is as follows:

- A. The psychiatric evaluation requested by the NISEC was performed by a psychiatrist unlicensed at the time in the state of Indiana and the hearing officer was aware prior to the evaluation, yet allowed it to be entered as testimony.
- B. I was not granted the opportunity to submit my own psychiatric evaluation.
- C. The hearing officer stated that the LEA did not initiate a general education plan for said student yet there were not guidelines set by the hearing officer to offer specific directions as to what should be implemented.
- D. I am in disagreement that the finding of not eligible seems to reflect the status of my child at present and not w[h]ere he stood during the October 13, 200[0] and January 24, 2001 incidents. He has had some outside services since then. It is my understanding that if he were eligible, his IEP would have been re-evaluated yearly. This meaning that if he had received those services, that help may have allowed him to be more productive and not needing those services now, 1 year later. . .

School, on December 3, 2001, timely requested an extension of time within which to respond to the Petition for Review. Such request was based on School's counsel being involved in a due process hearing and having just received notice of this appeal. The BSEA granted the request on December 4, 2001, issuing an Order extending the deadline for responding to December 17, 2001, and the deadline for conducting a review and issuing a written decision to January 7, 2002.

School, on December 12, 2001, filed a Motion to Dismiss the Petition for Review. The bases for the Motion were three-fold: (1) The Petition for Review was not timely filed; (2) The Petition for Review lacks the required specificity; and (3) The parent failed to serve the representative of the other party with her Petition for Review. By facsimile transmission of December 12, 2001, Vicki Battle-Cashwell, Esq., entered her appearance on behalf of Student. On December 13, 2001, the BSEA entered the following Orders to the parties:

1. The Student has until the close of business, December 19, 2001, to file his response to the School's Motion to Dismiss. The BSEA will thereafter consider the matter and advise the parties accordingly.
2. The School, having already requested and received a continuance in order to file a Reply to the Petition for Review, will need to file such Reply by the date previously provided, December 17, 2001.
3. The parties are advised that such filings can be made by facsimile transmission to the attention of Kevin C. McDowell, General Counsel, Indiana Department of Education, through (317) 232-0744, so long as the original copy is mailed to his attention at the address above. Filings by facsimile transmission must be received by close of business, Indianapolis time in order to be timely. General Counsel serves as agent for receipt of pleadings and correspondence directed to the Board of Special Education Appeals.
4. Any pleadings or other correspondence directed to the Board of Special Education Appeals **must** be served on the representative of the other party. Failure to do so may result in dismissal or default, as appropriate.

On December 26, 2001, the BSEA entered the following Order Denying Motion to Dismiss to the parties:

The Merrillville Community Schools (hereafter, the School), by its counsel, Monica J. Conrad, filed on December 12, 2001, its Motion to Dismiss the Petition for Review, said Motion to Dismiss in the following words, to wit:

(H.I.)

Thereafter, by facsimile transmission of December 12, 2001, Vicki Battle-Cashwell, Esq., entered her appearance on behalf of . . . (hereafter, the Student), in the following words, to wit:

(H.I.)

The Board of Special Education Appeals directed counsel for the Student to file a Response to the School's Motion to Dismiss, and to do so by the close of business, December 19, 2001. However, counsel for the Student failed to do so. The School timely filed its Response to the Petition for Review, in accordance with the BSEA's orders.

The BSEA notes that the Independent Hearing Officer in this matter caused to be mailed to the parent as well as the parent's counsel the written copy of his final decision. The date the parent received the written decision was November 2, 2001. The Petition for Review was filed on November 30, 2001, which would be within the time frame for filing such a Petition should the date of receipt by the parent be employed. 511 IAC 7-30-4(d)(4). Although parent's counsel did subsequently file what is being interpreted as an appearance for the Student and parent in this matter, this appearance did not arrive until after the School had filed its Motion to Dismiss. The Petition for Review appears to have been prepared by the parent without the assistance of counsel. Certainly counsel has not assisted the parent by failing to respond to the School's Motion to Dismiss. It is noted that the Parent failed to comply with 511 IAC 7-30-4(d)(2) by not providing a copy of the Petition for Review to the counsel of the School. This could result in dismissal but will not in this case at this time. The Indiana Department of Education provided the School's representative with a copy of the Petition by transmittal memorandum of December 3, 2001, and the School requested and received additional time to prepare a Response. As to the lack of specificity, the BSEA will take this under advisement when it conducts its review on January 3, 2002, without oral argument and without the presence of the parties or their respective counsel.

The Response to the Petition for Review

The School filed on December 17, 2001, Respondents' Reply to Petition for Review. School asserts that pursuant to 511 IAC 7-30-4(j), the BSEA is prohibited from disturbing the findings of fact, conclusions of law, or orders unless it finds that such were: (1) arbitrary or capricious; (2) an abuse of discretion; (3) contrary to law, contrary to a constitutional right, power, privilege or immunity; (4) in excess [of] the jurisdiction of the Independent Hearing Officer; (5) reached in violation of an established procedure, [or] (6) unsupported by substantial evidence. The School asserts that none of the exceptions recited in the Petition for Review met this standard. of review.

The School's claims include the following:

1. With regard to A & B in the Petition for Review, School claims that Student refused School's request to conduct a psychiatric evaluation. School then sought an order from the IHO. The IHO made clear to the mother of Student that she could seek a psychiatric

evaluation if she disagreed with the results of School's initiated evaluation. School claims that Student's mother chose not to seek a psychiatric evaluation and chose to proceed with the hearing. The School's evaluation was conducted by Dr. Schwarz. The School claims that: Dr. Schwarz held a license to practice medicine in the State of Illinois; Dr. Schwarz's Indiana license lapsed in July 2001, after not receiving payment for license renewal; Dr. Schwarz contacted the Indiana Professional License Board, and that his contact instructed him that upon payment, his license would be retroactively renewed for general diagnostic purposes but not retroactively applied as to the prescribing of medication. The IHO ruled that there was no evidence that failure to pay a fee would implicate his ability to make an analysis in this case. School asserts that: the IHO properly considered the psychiatric evaluation. School claims that "in an effort to attack the IHO's findings of ineligibility, Petitioner seeks to belatedly introduce an evaluation from Campagna Academy. Should the Board of Special Education Appeals permit such to be entered into evidence through its review, Respondents respectfully request the right to full disclosure of Campagna Academy's records pertaining to Petitioner and the right to cross examine the evidence. The IHO granted the Respondents request to subpoena the records from Campagna Academy. Campagna Academy's attorney notified the IHO to instruct him that without a specific parental consent to release records, Campagna Academy would not comply with the subpoena request...Consequently, Respondents sought a motion to exclude testimony and evidence concerning Campagna Academy. Since no evidence pertaining to these was introduced, the IHO did not have to rule on Respondents' motion. Respondents' position before the IHO was that records should be either fully disclosed or not permitted as evidence. Had Petitioner wanted any part of Campagna Academy's records to be considered by the IHO, she needed to only provide written permission. Instead, Petitioner choose [sic] to preclude all such records from these proceedings by withholding consent."

2. With regard to C in the Petition for Review, School claims that the only reference to General Education Intervention (GEI) contained within Article 7 are 511 IAC 7-17-40, which defines GEI, and 511 IAC 7-25-3(b), which requires school to have a procedure that is implemented at the building level. School also claims that there are no specific

requirements for what a GEI plan must contain, and that a GEI plan should be determined by the School based on information about how the student's education performance is adversely affected. School asserts that this process can be initiated once Student returns to the school, and when the plan is developed, it should address current concerns. School desires that any such plan should also be coordinated with Student's probation officer. School asserts that the extent of the IHO's order as written is within his authority to determine.

3. With regard to D in the Petition for Review, School asserts that the evidence shows that Student did not qualify as a student with an emotional disability. 511 IAC 7-26-6(a) states, in part, "An emotional disability is a condition that, over a long period of time and to a marked degree, consistently interferes with a student's learning process ..." School claims that the IHO's ruling that Student is not nor was a student with an emotional disability is supported by the evidence and should not be disturbed. School asserts that Student has failed to demonstrate that the IHO's ruling was arbitrary or capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence.
4. School requests the BSEA deny the Petition for Review.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated December 17, 2001. Review was set for January 3, 2002, in Indianapolis, in the offices of the Indiana Department of Education.

All three members of the BSEA appeared on that date. After review of the record as a whole and in consideration of the Petition for Review, and the Response thereto, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. 511 IAC 7-30-4(d)(3) requires that a Petition for Review be "specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]" The Petition for

- Review does not identify findings or conclusions with which the parent takes exception.
3. The BSEA denies Part A of the Student's Petition for Review.
 4. The BSEA denies Part B of the Student's Petition for Review.
 5. The BSEA denies Part C of the Student's Petition for Review.
 6. The BSEA denies Part D of the Student's Petition for Review because the Complaint Report had already determined non-eligibility of the Student for special education services.

ORDERS

In consideration of the forgoing, the Board of Special Education Appeals now issues the following Orders:

1. Accepts the IHO's decision as written, with corrections of dates.
2. Any other motions not addressed specifically in this opinion are hereby deemed to be overruled or denied.

Date: January 3, 2002

/s/Raymond W. Quist
Raymond W. Quist, Chair
Board of Special Education Appeals

APPEAL STATEMENT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.